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APR 13 1946

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

Nos. ~~997~~ ~~998~~ 70-71

EDWARD KATZINGER COMPANY,
Petitioner,

vs.

CHICAGO METALLIC MFG. COMPANY,
Respondent.

ANSWER OF PETITIONER TO RESPONDENT'S REPLY TO PETITION FOR CERTIORARI.

CHARLES J. MERRIAM,
STANLEY HOODS,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent's reply misstates a number of facts.

(1) The respondent repeatedly asserts that the District Court and the Circuit Court of Appeals in their final decisions found that respondent's Bake-King tinware would not infringe patent 2,077,757 if that patent were valid. This is not a fact.

The District Court found respondent's Bake-King tinware did infringe petitioner's patent, as shown by the opinion of the District Court, and by its finding of fact and conclusions of law (see record pp. 143-144, 156, and 157).

On the last hearing the District Court found the patent invalid and therefore did not consider the question of in-

fringement. On appeal the Court of Appeals did not pass upon the question of infringement, but found the patent invalid.

The decree of course found that the charge of infringement had to be dismissed because of invalidity of the patent, but it did not reopen the question of infringement which it had already found to exist assuming that the patent was valid. The dismissal of a charge of infringement because the patent is invalid is not a finding of non-infringement.

As the record now stands, if this court holds petitioner entitled to the estoppel asserted, petitioner should be entitled to a decree, although it is true that the Court of Appeals has never passed upon the question of infringement, and that matter might be open in the Court of Appeals if this court does not choose to pass upon it.

(2) Respondent states on pages 2 and 5 of its reply that the record shows the price restrictions of the contract were in force for about two years.

On the contrary the opinion of the Lower Court (Rec. 143) found:

> "In this case no price fixing by the respondent has been proved by the petitioner. The evidence shows that the clause to which petitioner refers in its argument was inserted in the contract at the request of the petitioner. At no time did the respondent attempt to carry it out and the respondent was at all times willing to have same removed from the contract."

It should be borne in mind that the parties were reversed at the time of that hearing and the present petitioner was then respondent.

(3) On page 2, paragraph b, respondent states that non-smooth baking ware was not new with Jackson and cites three patents as showing this. None of the three

patents cited refers to baking ware. The first two patents are design patents relating to trays, specifically serving trays. The third patent, Palmer, is a mechanical patent relating to a pin tray. The first two patents were admitted by respondent in its brief before the Circuit Court of Appeals not to show non-smooth ware. We quote from pp. 21 to 22 of respondent's brief:

> "It is quite true that the Examiner allowed the claims over such references as the Wojidkow design patent (R. 178) and the Ledig design patent (R. 175), but in neither of these illustrations does it necessarily appear that the shade lines represent elevations and depressions. They may be no more than surface ornamentation."

(4) Respondent states that the Palmer patent was omitted from the Circuit Court of Appeals record, and from the record here. The Palmer patent was omitted from the printed Court of Appeals record by inadvertence of both parties. It is present before the Circuit Court of Appeals as a physical exhibit pursuant to stipulation, and is available in the event that Certiorari is granted.

Respectfully submitted,

CHARLES J. MERRIAM,
STANLEY HOODS,
Counsel for Petitioner.